Office-Supreme Court, U.S.
FILED
MAR 7 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-331

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF NEW MEXICO, ET AL.,

Petitioners,

v.

MESCALERO APACHE TRIBE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE WHITE MOUNTAIN APACHE TRIBE AS AMICUS CURIAE SUPPORTING RESPONDENT

Robert C. Brauchli
Attorney of Record
P.O. Box 700
Whiteriver, Arizona 85941
(602) 338-4346 Ext. 245

Anthony R. Cohen
310 S. Convent
Tucson, Arizona 85701

Attorneys for Amicus

CONTENTS

AUTHORITIES. iii

INTEREST OF AMICUS CURIAE. 1

ARGUMENT. 6

I. JUDICIAL GUIDELINES FOR DETERMINING THE JURISDICTION OF THE MESCALERO TRIBE OVER HUNTING AND FISHING ON THE MESCALERO APACHE RESERVATION TO THE EXCLUSION OF THE STATE OF NEW MEXICO ARE WELL ESTABLISHED. . . . 6

A. Preemption Analysis. 6

B. Arguments of the State of New Mexico and Amici States of Arizona, Utah and Washington Do Not Adhere to Judicial Preemption Guidelines. 10

C. The Federal Interests Involved Are Substantial. . . 14

D. State Interests Are Restricted By Operation of Federal and State Statutes on the Mescalero Apache Reservation and its Natural Resources. 20

E. State Attempts to Require Licensing of Non-Indians To Hunt and Fish on the Mescelaro Apache Reservation is Barred by Application of the Winters Doctrine. . . . 23

II. NEW MEXICO'S REGULATION AND LICENSING OF NON-INDIAN HUNTING AND FISHING ON THE RESERVATION INFRINGES UPON TRIBAL SELF-GOVERNMENT. 28

CONCLUSION. 42

CERTIFICATE OF SERVICE. 43

Arizona v. California,
373 U.S. 546 (1963). 26, 39

Cappaert v. United States,
426 U.S. 128 (1976 26

Colville Confederated Tribes v. Walton,
647 F.2d 42 (1981). 25, 26, 27

Fisher v. District Court,
424 U.S. 382 (1976). 21

Knight v. Shoshone & Arapahoe Indian Tribes,
Slip Op. at p.5, No. 80-1810 (10th Cir.,
Feb. 8, 1982). 27

McClanahan v. Ariz. State Tax Comm.,
411 U.S. 164 (1973). 21

Merrion v. Jicarilla Apache Tribe,
___U.S.___, 716 L.Ed. 2d 21 (1982). .14, 29,36

Mescalero Apache Tribe v. New Mexico,
677 F.2d 55 (1982). 34

Montana v. United States,
450 U.S. 544 (1981). 30

Northern Cheyenne, etc. v. Adsit,
___ F.2d ___ (9th Cir., 1982). 21

Oliphant v. Suquamish Indian Tribe,
435 U.S. 191 (1978). 30

Ramah Navajo School Board v, Bureau of
Revenue of New Mexico,
___ U.S. ___ (1982) 102 S.Ct. 3394 (1982).6,28

Cases: Page:

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978). 9

State of New Mexico v. Mescalero Apache Tribe,
630 F. 2d 726 (10th Cir., 1980). 10

State of Washington v. Confederated Tribes of the Colville Reservation,
447 U.S. 134 (1980). 11, 12, 13

United States v. Mazurie,
419 U.S. 544 (1975). 8

United States v. Montana,
___ U.S. ___, 676 L.Ed. 2d 493 (1981). . . .25

United States v. Wheeler,
435 U.S. 313 (1978) 7, 8

United States v. Winters,
207 U.S. 564 (1908). 22, 23

White Mountain Apache Tribe v. State of Arizona,
No. CIV-77-867-PHX-WPC (D.Ariz. Nov. 9, 1977)
. 3

White Mountain Apache Tribe v. Bracker,
448 U.S. 436 (1980)...6, 7, 13, 19, 28, 33, 40

Williams v. Lee,
358 U.S. 217 (1959). 21

Williams v. United States,
227 U.S. 711 (1940). 21

Winters v. United States,
207 U.S. 564 (1908). 39

CONSTITUTIONS AND STATUTES:

36 Stat. 557. 20

67 Stat. 588 (1953) 17

16 U.S.C. §§3371 et seq.. 17

18 U.S.C. §1165 . . . . . .17, 18

25 U.S.C. §450 et seq. 18

25 U.S.C. 461 et seq. 15

25 U.S.C. 476. 18

25 U.S.C. §§1901 et seq 19

Mescalero Constitution,
Article XI §1. 17

PUBLICATIONS:

19 Weekly Compilation of Presidential
Documents (Jan. 31, 1983). 19

No. 82-331

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE WHITE MOUNTAIN APACHE TRIBE AS AMICUS CURIAE SUPPORTING RESPONDENT

The White Mountain Apache Tribe of the Fort Apache Indian Reservation respectfully submits this brief as amicus curiae.[1]

INTEREST OF AMICUS CURIAE

The White Mountain Apache Tribe occupies a portion of its aboriginal homeland on approximately 1.6 million acres in the north central and eastern portion of the State of

---

[1] Consent of the State of New Mexico and the Mescalero Apache Tribe has been granted to the White Mountain Apache Tribe to file this brief pursuant to S. Ct. R. 36.2.

Arizona on what is now known as the Fort Apache Indian Reservation. Like the Mescalero Apache Tribe, the White Mountain Apache Tribe owns all but a miniscule area (approximately 48 acres) of its heavily forested and mountainous Reservation which like the Mescalero Apache Reservation has a federal fish hatchery which provides fish for stocking on the Reservation's abundant streams and man-made lakes and impoundments. The topography, fauna and flora which thrive on the Fort Apache Indian Reservation are similar to that on the Mescalero Apache Reservation.

The White Mountain Apache Tribe, like the Mescalero Apache Tribe with the financial and technical assistance of the Bureau of Indian Affairs, the United States Bureau of Sports Fisheries, and United States Indian Fisheries Assistance Program, has developed, managed, utilized and maintained a recrea-

tional hunting, fishing and camping program as part of its overall economic development and goals of self-sufficiency and economic independence.

In summary, many factual aspects of the Mescalero Apache Tribe's litigation with the State of New Mexico parallel those involved in the present litigation between the White Mountain Apache Tribe and the State of Arizona. The White Mountain Apache Tribe's case, styled White Mountain Apache Tribe v. State of Arizona, No. CIV-77-867 PHX-WPC (D. Ariz. Nov. 9, 1977), is now awaiting trial before the United States District Court for the District of Arizona, following remand to the court from the Ninth Circuit Court of Appeals in the case styled White Mountain Apache Tribe v. State of Arizona, 649 F.2d 1274 (1981).

Both the State of Arizona in the White Mountain Apache case and the State of New

Mexico in the case at bar, are attempting to license and regulate non-Indian hunting and fishing on the two respective reservations of these tribes. These state attempts conducted under the auspices of state-wide game and fish management for the ostensible benefit of citizens on a state-wide basis cannot possibly achieve that goal without tribal assent or subjugation and are in actuality little more than naked revenue generating devices designed to reap immeasurable revenues and benefits from the results of tribal initiative in recreational development with a concomitant insignificant state contribution.

It is this imminent threat to tribal sovereignty over its natural resources and infringement upon tribal self government that compels the White Mountain Apache Tribe to enter its appearance as amicus curiae on behalf of the Respondent. The interest of

the White Mountain Apache Tribe in resisting state encroachment on its ancestral lands and water is identical to that of the Mescalero Apache Tribe in this case.

This brief adopts without restatement the statement of the case set forth by the Respondent Mescalero Apache Tribe and the brief of the United States as amicus curiae.

The White Mountain Apache Tribe fully supports the legal arguments set forth in the brief of the Respondent and will distinguish where pertinent, misconceptions of the applicable law set forth in the amici curiae brief of the State of Arizona and State of Washington.

ARGUMENT

I. JUDICIAL GUIDELINES FOR DETERMINING THE JURISDICTION OF THE MESCALERO TRIBE OVER HUNTING AND FISHING ON THE MESCALERO APACHE RESERVATION TO THE EXCLUSION OF THE STATE OF NEW MEXICO ARE WELL ESTABLISHED.

A. Preemption Analysis

This Court has provided State and Federal Courts with a comprehensive framework of inquiry to make a determination whether or not federal law, policy, or activity preempts the exercise of state authority over non-Indians involved with Reservation activities. White Mountain Apache Tribe v. Bracker, 448 U.S. 436 (1980); Ramah Navajo School Bd v. Bureau of Revenue of New Mexico, ___U.S.___ (1982), 102 S. Ct. 3394 (1982).

This framework of inquiry to determine the existence or not of federal preemption calls for "a particularized inquiry into the

nature of the state, federal, and tribal interests at stake." White Mountain Apache Tribe v. Bracker, supra, 448 U.S. at 144-145.

The fundamental backdrop against which the State of New Mexico's actions must be measured involve traditional notions of tribal sovereignty and self-government. Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. United States v. Wheeler, 435 U.S. 313, 323 (1978). The tradition of Indian sovereignty over its reservation and tribal members long recognized by this Court, informs the determination whether the exercise of state authority has been preempted by operation of federal law. White Mountain Apache Tribe v. Bracker, supra, 448 U.S. at 141-145, 100 S.Ct. at 2582-2584.

It is well understood that by virtue of their dependent nation status Indian tribes do not have the authority to wage war, enter into treaties with foreign nations, or to exercise criminal prosecutorial power over non-Indians. However, in areas where tribes retain the full attributes of sovereignty, such as over their tribal members, territory and natural resources, they may exercise and offer the full panoply of governmental authority and services. The authority manifests itself by tribal courts, the exercise of extensive civil jurisdiction by the implementation of taxation, and plenary control, subject only to the authority of the trustee United States, over the preservation, utilization, management, and development of the natural resources of the reservation. United States v. Mazurie, 419 U.S. 544, 557 42 L.Ed 2d 706, 95 S.Ct. 710 (1975); United States v. Wheeler, supra, 435 U.S. at 323

55 L.Ed.2d 303, 98 S.Ct. 1079 (1978); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56- 55 L.Ed 2d 106, 98 S.Ct. 1670 (1978).

These natural resources, include but are not limited to timber, grazing lands, water, minerals and game and fish which are found within the exterior boundaries of the reservation.

Tribal sovereignty necessarily embodies a geographical component- that being the reservation itself and must necessarily extend to and protect the sovereign right and authority of an Indian tribe to market the value derived from the development of reservation resources. This right without interference from the State of New Mexico, to recover and market value derived from reservation resources fulfills the federal purpose behind the creation of the Mescalero Apache Reservation as discussed, infra.

This hegemony over tribal territory

exercised by the Mescalero Apache Tribe exists subject only to the sufferance of Congress and until Congress acts, the tribe retains their existing sovereign powers over their reservation and its natural resources.

The Tribe's traditional sovereign powers over natural resources is discussed, infra, which establishes that it is in this area where tribal and federal interests are so paramount as to "move from a mere backdrop into a leading role in the litigation stage." Mescalero Apache Tribe v. State of New Mexico, 630 F.2d 726, 728 (10th Cir., 1980).

B. Arguments of the State of New Mexico and Amici States of Arizona, Utah, and Washington Do Not Adhere to Judicial Pre-emption Guidelines.

Arguments submitted by the State of New Mexico and amici curiae State of Arizona, Utah and Washington avoid the "particularized inquiry" determinative of federal

preemption and attempt to characterize the Mescalero Apache case as a regulation case and cite State of Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980) as authority for concurrent state regulation of non-Indian hunting and fishing within the Mescalero Apache Reservation.

The Colville case, supra, involved the authority of the State of Washington to collect a sales tax on the sale of cigarettes to non-Indians who purchased the cigarettes from tribally owned smoke shops within the exterior boundaries of the Colville Reservation.

This Court upheld the imposition of the state's tax on such sales to non-Indians noting in holding that the tribe was marketing its sales tax exemption rather than value derived or generated on the reservation "by activities in which the tribes have a significant interest." Id at 155.

The implication from the Court's holding in the cigarette tax case is that the Indian Commerce Clause would invalidate state taxes or regulation where value generated and derived on and from the reservation was at issue. The result in Colville, supra, might have been quite opposite if the tribes there had planted, cultivated, and harvested tobacco and manufactured the cigarettes sold to non-Indians.

In the Mescalero case, the value marketed is at the other extreme as that involved in the cigarette tax case. The Mescalero Apache Tribe is marketing a value solely derived and generated by the natural resources of the reservation. The game and fish which thrive in the favorable habitat on the reservation have been developed, managed, preserved and maintained by tribal initiative and revenues with the cooperation and assistance both monetary and

technical of the federal government. But for the favorable habitat, conservation and game and fish management practices of the Mescalero Tribe and the federal government, there would be no "value" to market to non-Indians.

The Petitioners and amici in support, avoid the crucial court distinction between value derived from reservation resources and that which is not and instead attempt to bring the Mescalero case within the holding of Colville by likening a discount shopping center marketing a tribal sales tax exemption to a reservation lake of the same size. To state the analogy is to refute it. Such an analogy belies the substantial tribal interest in game and fish and the maintenance and preservation of their habitat on the reservation. Such a tribal interest is no different than that discussed in White Mountain Apache Tribe v. Braker, supra,

regarding Indian timber or the oil and gas discussed by this Court in Merrion v. Jicarilla Apache Tribe, ____U.S.____, 716 L.Ed 2d 21 (1982). All of the above constitute value generated on or derived from federal and tribal activity within the exterior boundaries of Indian Reservations in order to achieve and fulfill the federal purpose and policy behind the creation of reservations, tribal economic self-sufficiency and independence.

C. The Federal Interests Involved Are Substantial.

The brief of the United States as amicus curiae and the brief of the Respondent Mescalero Apache Tribe amply discuss the substantial federal interests involved in this case. Amicus White Mountain Apache Tribe further suggests that the penumbra effect and central purpose of various federal statutes discussed, infra, is to protect

Indian Reservations from other than federal authority, to perpetuate their existence as viable tribal homelands and to develop reservations toward economic self-sufficiency and independence through administration of the United State's trust responsibilities and the exercise of tribal self-government.

The Mescalero Apache Tribe like amicus White Mountain Apache Tribe, is organized under Section 16 of the Indian Reorganization Act of 1934 and as such is governed by a Constitution adopted pursuant to the Act, 25 U.S.C. §461, et seq., specifically, 25 U.S.C. §476.

The Indian Reorganization Act of 1934 was enacted in recognition by the federal government of the failure of its assimilation policies and represented a fundamental change in federal policy toward Indian tribes.

The Indian Reorganization Act reaffirmed

the Mescalero Apache Tribe's inherent sovereignty over its territory and people and established a federally recognized government to government relationship with the Mescalero Apache Tribe and the United States of America. It requires no citation or argument that the federal policy behind the Indian Reorganization Act was to encourage the preservation of tribal natural resources, culture, values and language, self-government and self-determination by the establishment of viable tribal governments responsible for carrying out these goals.

The Mescalero Constitution which has been ratified by the Secretary of the Interior reaffirms the tribe's inherent historical sovereignty and power "[t]o protect and preserve the property, wildlife and natural resources of the tribe, and to regulate the conduct of trade and the use and disposition of tribal property upon the reservation."

Article XI, §1 (c) Mescalero Apache Constitution.

Additionally, the Mescalero Tribe has enacted a comprehensive Tribal Game and Fish Ordinance[1] pursuant to their constitution, provisions of which may be enforced by the United States of America under recent amendments to the Lacey Act, 16 U.S.C. §3371 et seq., which provide for federal civil and criminal sanctions for violating any tribal law pertaining to fish, wildlife, or plants. This statute passed in November of 1981 demonstrates strong Congressional support for tribal police power over its game, fish and plant life.

Related to this statute is 18 U.S.C. §1165 which provides for federal criminal

---

[1] These tribal ordinances have the effect of federal law when ratified by the Secretary of the Interior and should enjoy the protection of the Supremacy Clause. United States v. Mazurie, 419 U.S. 544, 95 S.Ct. 710, 717, 42 L.Ed 2d 706 (1975).

sanctions against persons trespassing on tribal trust lands for purposes of hunting and fishing. The apparent intent of Congress in 18 U.S.C. §1165 was to insure tribal jurisdiction over non-Indians on all land within a reservation. In discussing H.R. 4386, which eventually became 18 U.S.C. §1165, Representative Libonati said:

> "Mr. Speaker, this legislation is for the purpose of placing under tribal law the right to prosecute whites. Under the tribal laws they can only prosecute Indians."

105 Cong. Rec. 13713 (July 20, 1959).

In terms of economic self-sufficiency and tribal self-determination Congress has expressed strong support for tribal control, development, management and utilization of reservation natural resources to achieve those goals. See Indian Financing Act of 1974, 25 U.S.C. §§1451 et seq., the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§450

et seq., the Indian Child Welfare Act, 25 U.S.C. §§1901, et seq, and other federal statutes noted in White Mountain Apache Tribe v. Bracker, supra., at 143, N.10, which together express "a firm federal policy of promoting tribal self-sufficiency and economic development." Id. and assumption by the federal government through these statutes and treaties, a fiduciary duty for the protection and preservation of Indian tribes and their resources.

This Congressional policy has recently been reaffirmed by President Reagan's statement on Indian Policy, issued on January 24, 1983, which comitted the Executive Branch to the Federal Policy of promoting tribal self-sufficiency, economic development and tribal independence. 19 Weekly Compilation of Presidential Documents (January 31, 1983).

D. State Interests Are Restricted By Operation of Federal and State Statutes on the Mescalero Apache Reservation and its Natural Resources.

In addition to the formidable array of facts in the record reflecting de minimus state contribution and legitimate interest in hunting and fishing by non-Indians on the Mescalero Apache Reservation, there exist federal and state statutory barriers against New Mexico's attempt to regulate the tribe's utilization of its natural resources.

The New Mexico Enabling Act, 36 Stat. 557, upon which New Mexico's admission into the Union was conditioned, "forever disclaims all right and title" to lands owned or held by the Mescalero Apache Tribe and declares that such lands "shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of

the United States." Id. The Enabling Act prohibits state proprietary and regulatory control, claims, and jurisdiction over such Indian lands. McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973); Fisher v. District Ct., 424 U.S. 382, 386 and N.8 (1976); Williams v. Lee, 358 U.S. 217, 220-23, N.10 (1959); Williams v. United States, 327 U.S. 711, 714, N. 10 (1940); Northern Cheyenne, etc., v. Adsit, ____ F.2d ____ (9th Cir., 1982).

Public Law 280, Act of August 15, 1953, 67 Stat. 588, provided states the opportunity to obtain civil jurisdiction over Indian Tribes but the State of New Mexico never availed itself of that opportunity. A negative inference is certainly appropriate to make based upon its failure to adopt Public Law 280 and the concomitant responsibility its adoption would have entailed toward Indian Tribes in New Mexico.

Presently, the State of New Mexico unlike the United States, has no trust responsibility or duty to the Mescalero Apache Tribe or its land, water and natural resources.

The State of New Mexico by its enforcement of state licensing requirements on non-Indians hunting and fishing on the Mescalero Apache Reservation is seeking to diminish the tribe's proprietary authority over its land, water and tribal natural resources including game and fish. As discussed, infra, federal policy embodied in the creation of the reservation and as expounded by this Court in United States v. Winters, 207 U.S. 564, 576, 78 S.Ct. 207, 211, 526 L.Ed 340 (1908) and its progeny, preclude any state intrusion or interference with the tribe's reserved rights to its natural resources, land and water, and their utilization.

E. State Attempts to Require Licensing of Non-Indians To Hunt and Fish on the Mescalero Apache Reservation are Barred by Application of the Winters Doctrine.[2]

The hunting and fishing permits issued by the Mescalero Apache Tribe grant by implication permission to non-Indians to enter upon and through the reservation to engage in those activities. Only the Mescalero Apache Tribe can consent to such entry. The State of New Mexico concedes that the fishing and hunting permit issued by the State of New Mexico is valueless without tribal assent. It is difficult to accept New Mexico's argument that a state license is required when nothing is bestowed upon

---

[2] United States v. Winters, 207 U.S. 564, 576, 78 S.Ct. 207, 211, 526 L.Ed 340 (1908)

the non-Indians by its purchase.

This situation is similar to that litigated in Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (1981). In that case, Walton, a non-Indian purchaser of an Indian allotment, claimed a right to use a certain quantity of water by virtue of water permits issued by the State of Washington. Id. at 51.

Citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143, 100 S.Ct. 2578, 2583; White Mountain Apache Tribe v. Arizona, 649 F.2d 1274 (9th Cir., 1981), the Ninth Circuit held that the State of Washington had no power to regulate water in the water system in issue and that the permits were of no force and effect. The Court reasoned that state regulation of water on the reservation was preempted by the creation of the Colville Reservation. (Emphasis added) Further, that where land

is set aside for an Indian Reservation, Congress has reserved it for federal as opposed to state needs. Colville Confederated Tribes v. Walton, supra., at 52-53.

The Walton Court further held, citing United States v. Montana, ___ U.S. ____, 101 S.Ct. 1245, 1257, 67 L.Ed 2d 493 (1981), that the Colville Tribes retained the inherent power to exercise civil authority over the conduct of non-Indians even on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe. Colville Confederated Tribes v. Walton, supra. at 52. This includes conduct that involves the tribe's water rights. United States v. Montana, supra, N.15.

The waters of the Mescalero Apache Reservation like those on the Colville Reservation were reserved to the tribe upon creation of the reservation. United States v. Winters,

207 U.S. 564, 576, 78 S.Ct. 207, 211, 526 L.Ed 340 (1908); Cappaert v. United States, 426, U.S. 128, 139, 96 S.Ct. 2062, 2061, 48 L.Ed 2d 523 (1976); Arizona v. California, 373 U.S. 546, 598, 83 S.Ct. 1468, 1496, 10 L.Ed 2d 542 (1963). Permitting Indians to determine how to use reserved waters has been held consistent with the general purpose for the creation of an Indian Reservation; providing a homeland for the survival and growth of the Indians and their way of life. Colville Confederated Tribes v. Walton, supra at 49.

Conflicting regulations imposed by the State of New Mexico on the use of the trout fishery and game of the reservation will have a direct effect on the tribe's use of this resource. The regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Id at 52. Its regulation is an

important sovereign power. Id.

In another tribal sovereignty case involving the power of a tribe to enact a tribal zoning code adopted by the Shoshone and Arapahoe Tribes, the Tenth Circuit, in response to a non-Indian developer alleging that the tribes had no authority to enact the zoning ordinance stated:

> "We disagree, Indian Tribes have 'attributes of sovereignty over both their members and their territory.' . . . included in the tribal power is 'a broad measure of civil jurisdiction over the activities of non-Indians on Indian Reservation lands in which the tribes have a significant interest."

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152-153, cited by Knight v. Shoshone and Arapahoe Indian Tribes, Slip Op. at p. 5, No. 80-1810 (10th Cir., Feb. 8, 1982).

The case for substantial tribal interests of the Mescalero Tribe is even stronger when it is considered that the Walton case, supra,

involved fee land within the boundaries of the reservation, while the waters and other natural resources reserved for the Mescelero Apache Tribe, and the conflict in this case over their use and regulation, all occur entirely within trust land owned by the Mescalero Apache Tribe.

II. NEW MEXICO'S REGULATION AND LICENSING OF NON - INDIAN HUNTING AND FISHING ON THE RESERVATION INFRINGES UPON TRIBAL SELF-GOVERNMENT.

This Court held, in White Mountain Apache Tribe v. Bracker, 448 U.S. at 143 (1980) and recently reaffirmed in Ramah Navajo School Board v. Bureau of Revenue of New Mexico, ____ U.S. ____, 102 S.Ct. 3394 (1982), that the fact that a state action interferes with a tribe's ability to exercise its sovereign functions". . . standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the

reservation. . . " since Indian Tribes are "a good deal more than 'private voluntary organizations'" and since they are "unique aggregations possessing attributes of sovereignty over both their members and their territory," [citations omitted] Merrion v. Jicarilla, __ U.S. ___, 102 S.Ct. at 903 (1982). This Court held in Merrion that a tribe's authority to tax non-Indians derived not only from its power to exclude them, but also from the necessity of such authority to "tribal self-government and territorial management." Id.

The power of a tribe to govern itself and its territory is one of the incidents of its inherent sovereignty. Just as the parameters of a tribe's retained sovereignty vary depending upon the particular aspect of such sovereignty which is examined, so too do the parameters of self-government; for self-government consists of the institutions by

which a people exercise their sovereignty to manage their relations and their territory.

An examination of the cases of this Court reveals that tribal self-government is not a monolithic phenomenon which is simply defined for all purposes, but rather is a mosaic of separate institutions, some of which tribes have retained, and some of which have been lost. For example, when this Court decided, in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) that the power of an Indian Tribe to exercise criminal jurisdiction over non-Indians within its borders would be inconsistent with its dependent status, this Court defined not only the limits of a particular facet of the tribe's sovereignty, but also the limits of particular institutions of its self-government and territorial management. And when, in Montana v. United States, 450 U.S. 544, (1981), this Court held that the Crow Tribe had not retained

the inherent sovereign authority to regulate hunting and fishing by non-members on non-tribal fee lands within their reservation, the effect was to prohibit that particular aspect of tribal self-government and territorial management. In the same case, however, this Court confirmed that a tribe's sovereign power, and thus its civil jurisdiction, a component of its self-government, does extend to non-Indians even on non-Indian fee land within the reservation, "who enter consensual relationships with the tribe. . ." or whose conduct "threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe." Id., at 564-565 [3]. In view of these cases, and the many others which

---

[3] Montana did not directly address the situation present in this case, where the non-Indian activity takes place on Indian trust land, but its language clearly implies that the tribe has at least such civil jurisdiction on Indian trust land.

delimit the bounds of various aspects of tribal sovereignty, and thus self-government, the implied and express assertions of New Mexico and the amici curiae states that tribal self-government extends only to the governing of Indians, and, at most to the exclusion of non-Indians, are without merit.

A tribe's powers of self-government vary, depending, among other things, upon the fee or trust status and ownership of the reservation lands, the Congressional enactments, executive orders and federal policies regarding the particular aspect of self-government under scrutiny, and the historical relationship which that aspect of self-government bears to the purposes for which the reservation was created.[4] Therefore, a particular-

---

[4] In Montana v. United States, supra, at footnote 15, the Court noted, as a corollary, that "Indian Tribes retain rights to river waters necessary to make their reservations livable," citing Arizona v. California, 373 U.S. 546. The tribes also must retain the powers of self-government necessary to implement those rights.

ized inquiry is as necessary to the "infringement of self-government" test, as Bracker, supra, found it to be to the preemption test. For the purposes of the infringement test, however, what must be examined is the nature of the particular aspect of self-government which faces potential infringement.

In the instant case, New Mexico and the amici curiae states of Arizona, Washington, and Utah have sought to obscure the impact of state regulations on tribal self-government by characterizing this as "merely" a case of alleged injury to the tribe's economy,[5] and one dealing with the

---

[5] Amicus curiae White Mountain Apache Tribe concurs with Respondent Mescalero Apache Tribe's argument regarding economic injury to its ability to govern itself and with Respondent's argument distinguishing this case from the Colville cigarette case. The value taxed (or the privilege sold) by New Mexico is generated on the reservation from resources reserved to the tribe upon the creation of the reservation. Amici curiae Arizona and Wash-

relationship between New Mexico and non-Indians. In fact, the facet of tribal self-government most egregiously infringed upon is the tribe's ability to fulfill its trust responsibility to its members to manage the fish and game natural resources of the reservation for the benefit of those members. The Tenth Circuit Court of Appeals properly recognized the unique importance of the fish and game and habitat management aspects of tribal self-government in its decisions below. Mescalero Apache Tribe v. New Mexico, 630 F.2d 724 (1980), 677 F.2d 55 (1982). Since the Respondent Tribe has cogently explained the special importance of this aspect of

---

ton's comparison of lakes created on the reservation with reserved waters to a shopping center, and their comparison of fish to cigarettes proves the unwillingness of the amici curiae states to acknowledge even the most basic principles of federal Indian law. Indeed, the states still seek to appropriate tribal resources to their own use with alarming regularity.

tribal self-government, amicus curiae White Mountain Apache Tribe merely refers the Court to their brief on this issue. Worth emphasizing, however, is the fact that while New Mexico is bound by state statute to regulate and manage the game and fish within its jurisdiction for the benefit of all the people of the state, and, if given the power to regulate game and fish on the reservation would do so for the benefit of that constituency, such use of the resources of the reservation is contrary to the purposes for which the reservation was established.

Arizona and Washington claim that New Mexico and other states "only" seek to ensure that their regulations are enforced when they are more restrictive than a tribe's, and that the states do not seek to authorize activities the tribe would prohibit. This assertion misses the point.

The tribes have the right and the need in managing their use of their resources to authorize any such use subject only to constraints imposed or authorized by the federal government. This Court noted in Merrion v. Jicarilla, supra, that:

> ". . .the tribe's authority to tax non-members is subject to constraints not imposed on other governmental entities: the federal government can take away this power, and the tribe must obtain the approval of the Secretary before any tax on non-members can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies."

102 S.Ct. at 903. The same exact constraints apply to the regulation of the game and fish resources of Indian reservations. The resource is thus amply protected even from the unlikely situation of abuse by an irresponsible tribe. The

facts in the instant case, however, reveal a joint tribal and federal game and fish management program of the highest professional quality, and there is no justification for the imposition of more restrictive standards on the tribe's program of resource self-government. The authorization of the taking of game or fish is an important a management tool as is the restriction of taking. For example, if there is an overabundance of a particular species on the reservation, the tribe may need to reduce its numbers by authorizing a particular harvest. Harvest of a smaller number would be detrimental to the species and its habitat. Similarly, reservation conditions may require a longer, or different hunting or fishing season than that authorized by the state. Only the tribe, with its staff of field personnel and its biologist, and with

federal advisors, is in a position to evaluate the factors on the reservation and make appropriate recommendations to the Tribal Council. Only the Tribal Council can exercise the trust responsibility of setting regulations in such a way as to maximize the benefit of the resources to tribal members, while preserving reservation resources for future generations.

The amici curiae states make much of the movement of animals across the borders of the reservation, and insist that in view of this movement, states must be able to control on-reservation hunting and fishing by non-Indians. Arizona and Washington's reference, however, to wildlife being "fluid" points to the flaw in their reasoning. The fluid nature of the water reserved to the tribes upon the creation of reservations, Winters v.

United States, 207 U.S. 564 (1908), Arizona v. California, 373 U.S. 546 (1963) does not give states a right to regulate reservation water use. Neither does the fluid nature of game and fish permit New Mexico to interfere with tribal management of the game and fish resources of the Mescalero Apache Tribe, resources similarly reserved to the tribe. Nothing in the record of the case at bar indicates that New Mexico's inability to control non-Indian hunting and fishing on the reservation has injured the resource either on or off the reservation. The record in fact reflects the high quality of the tribe's management, and a possible benefit to New Mexico in the form of migratory elk. Jt. App. 214a.

Much has been said by New Mexico and the amici curiae states regarding the ecosystem in which the game and fish live,

and the necessity for uniform management. While thus appearing to invoke the sanctity of biological holism, the states evade the truth: the tribe, under federal supervision, is the only governmental entity which has the jurisdiction to regulate all aspects of the game and fish and their habitat of the reservation. Only the tribe can regulate the hunting and fishing of tribal members on the reservation. Likewise, only the tribe can regulate the grazing of cattle and the harvest of timber, two very important aspects of habitat management for game animals and fish. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). Similarly, only the tribe can close a critical habitat area to all access. Only the tribe can authorize the taking of game and fish and only the tribe can authorize their planting. Thus, while reciting the ecosystem litany, New Mexico fails to

reveal that even if it were to win this lawsuit, all it could do with respect to managing the reservation hunting and fishing resources, which are inseparable from their habitat, is control their harvest by non-Indians. This injection of partial state authority into the tribe's integrated comprehensive system of resource management would infringe upon the tribe's right to govern one of the most important aspects of its reserved resources.

For all of the above reasons, and for those stated in the briefs of Mescalero Apache Tribe and amicus curiae United States, the White Mountain Apache Tribe believes that New Mexico's regulation of non-Indian hunting and fishing on the Mescalero Apache Reservation would impermissibly infringe upon the tribe's program of hunting and fishing resource self-government.

CONCLUSION

For the reasons stated, the decision of the Tenth Circuit Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED,

Robert C. Brauchli,
Attorney for Amicus Curiae
White Mountain Apache Tribe
P.O. Box 700
Whiteriver, Arizona 85941
(602) 338-4346 Ext. 245

of Counsel:

Anthony R. Cohen
Attorney at Law
310 S. Convent
Tucson, Arizona 85701
(602) 622-8919

March, 1983